

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA,	:	13-CR-607(JFB)
	:	
	:	U.S. Courthouse
	:	Central Islip, New York
-against-	:	
	:	TRANSCRIPT OF
	:	PROCEEDINGS
	:	
PHILLIP A. KENNER and	:	April 28, 2015
TOMMY C. CONSTANTINE,	:	2:00 p.m.
	:	
Defendants.	:	

- - - - - X

BEFORE:

HONORABLE JOSEPH F. BIANCO, U.S.D.J.

APPEARANCES:

For the Government: LORETTA E. LYNCH, ESQ.
United States Attorney
271 Cadman Plaza East
Brooklyn, New York 11201
BY: JAMES MISKIEWICZ, ESQ.
SARITHA KOMATIREDDY, ESQ
Assistant U.S. Attorneys

For the Defendant
Kenner: RICHARD HALEY, ESQ.

Constantine: ROBERT LaRUSSO, ESQ.
ANDREW OLIVERAS, ESQ.

Court Reporter: Perry Auerbach, CSR
Official Court Reporter

Proceedings recorded by mechanical stenography, transcript
produced by Computer-Assisted Transcript.

PERRY AUERBACH, CSR
OFFICIAL COURT REPORTER

1 THE CLERK: United States versus Kenner and
2 Constantine.

3 Counsel, please state your appearance for the
4 record.

5 MR. MISKIEWICZ: Good afternoon, Your Honor, James
6 Miskiewicz for the United States.

7 MR. HALEY: Good afternoon, Judge, Richard Haley for
8 the defendant Phillip Kenner.

9 MR. LaRUSSO: And Robert LaRusso for Mr. Constantine
10 who I believe is on the phone, Your Honor.

11 THE COURT: Yes. Mr. Constantine, you're on the
12 phone?

13 DEFENDANT CONSTANTINE: Yes, Your Honor.

14 THE COURT: Okay, so why don't we get started.
15 First thing, we did get a call from someone from Northern
16 Trust Bank but I guess there was a little confusion because
17 initially I thought that was from you, Mr. Haley, but the guy
18 on the phone indicated that they were from Mr. LaRusso. So,
19 did you serve a subpoena on Northern Trust as well?

20 MR. LaRUSSO: No, Your Honor, I served a subpoena on
21 Louis Freeh's firm, they accepted the service for Mr. Jowdy.
22 Last time we spoke with Mr. Freeh's associate and he was going
23 to provide those documents that we subpoenaed to us and we
24 told him under the law they have to go back to the Court.
25 However, Mr. Miskiewicz and I, we just had a conversation, we

1 will take custody of them probably, provide them to the
2 government to make copies and we'll share them rather than
3 burden the Court if that's agreeable.

4 THE COURT: That's fine with me. The Northern Trust
5 guy thought it was going to you, is that wrong?

6 MR. LaRUSSO: Absolutely. I spoke to Northern
7 Trust.

8 THE COURT: You should probably call them back.

9 MR. HALEY: Your Honor, I spoke with your law clerk,
10 we certainly have no problem, my office, accepting the records
11 that were subpoenaed.

12 THE COURT: I don't know why the guy at the bank
13 thought the records were for Mr. LaRusso. We'll correct that.
14 I assume he's going to share them.

15 MR. HALEY: I spoke with the government, Your Honor,
16 if they're received by my office, I have zero problem
17 delivering them immediately to the government because they
18 have they greater technical ability to download all those
19 documents. So, I have no problem giving them to the
20 government and then we can share obviously the CD-roms.

21 THE COURT: We'll try to fix that then.

22 MR. HALEY: Unless they come to the Court, they can
23 go right to the government.

24 THE COURT: I was trying to save time and give them
25 directly to whoever had directed them.

1 MR. HALEY: It was my subpoena, Your Honor.

2 THE COURT: Okay.

3 (Pause while clerk confers with the Court.)

4 THE COURT: Did he speak to one of you yesterday,
5 someone from Northern Trust?

6 MR. HALEY: Not my office.

7 MR. LaRUSSO: My partner, Mr. Conway, spoke to
8 somebody from Mr. Freeh's office, not Northern Trust.

9 THE COURT: Maybe it's not Northern Trust, maybe
10 it's the Jowdy documents. You thought they were going to come
11 today?

12 MR. LaRUSSO: That is correct.

13 THE COURT: So you may be getting the Jowdy
14 documents.

15 MR. LaRUSSO: Okay, that's fine.

16 MR. HALEY: I would be surprised if Northern Trust
17 responded so quickly.

18 THE COURT: Okay, it must be that. You're going to
19 share those with co-counsel, correct?

20 MR. LaRUSSO: I'm going to give them to
21 Mr. Miskiewicz and they'll make copies and they'll provide it
22 to both of us.

23 THE COURT: Mr. Haley, go ahead.

24 MR. HALEY: First of all, Your Honor, thank you very
25 much, these are housekeeping matters and I will endeavor to be

1 brief, Your Honor.

2 Shortly after my appointment as CJA counsel for
3 Mr. Kenner I did by letter dated June 25th of 2014 request the
4 government identify all those documents alleged to be forged
5 or fictitious as represented in the bail letter written by
6 Ms. Capwell. On August 29 following that June 25th letter the
7 government did respond and provided four documents, two
8 documents known as funding consulting agreements, one document
9 known as a revolving line of credit purportedly signed by
10 Mr. Jowdy, and a fourth document, Judge, which bears the
11 purported signature of John Kaiser which is actually in
12 Spanish and it deals with underlying litigation in Mexico.

13 So, we received four documents that the government
14 represented to be forgeries in response to our letter. In
15 that letter they supplied the documents and represented the
16 forged documents and said these documents among others we
17 represent to be forged. I then responded, and it's all on the
18 ECF filings, Judge, please identify among others; well and
19 good we have four but what do you mean by "among others."
20 Then there became communication between myself and the
21 government that relates to the claim that there were among
22 other forged documents and my recollection, Judge, is either
23 on November 7th, I believe it was November 7th, perhaps
24 March 6th but I think it was November 7th and the issue was
25 raised in front of Your Honor. Your Honor did say to the

1 government in substance you really need to speak with all your
2 witnesses, have them identify the among other forged documents
3 and give the defense notice of those other documents you claim
4 to be forged.

5 I have ordered the transcript of those proceedings,
6 Judge. Harry Rappaport was the stenographer, I emailed him
7 about 7:00 last night to try to obtain those transcripts
8 because, as you know, he's no longer employed as a
9 stenographer.

10 So, my question, Judge, and the application to the
11 Court is really quite simple, are there any other documents
12 that the government will through witness testimony in its
13 case-in-chief as relates to the four corners of that
14 indictment alleged to be forged. I don't want to be in a
15 situation where I don't have some prior notice of that. I
16 believe as a matter of fundamental fairness there's going to
17 be a claim that there's a forged document to be presented to
18 the trier of fact, that is powerful evidence and I believe the
19 defense ought to have the opportunity to be able to confront
20 that evidence in advance of trial. Thank you.

21 THE COURT: Mr. Miskiewicz, are there any other
22 documents other than the four previously identified that the
23 government is going to argue are forged?

24 MR. MISKIEWICZ: Forged, no, and the four documents
25 that we identified early on that Mr. Kaiser consulted -- the

1 consulting agreement that was signed by Mr. Kaiser, we have
2 subsequently during our most recent face-to-face meeting we
3 explained what the nature of Mr. Kaiser's testimony is going
4 to be and it will be our position that it's a fraudulent
5 document that he had neither the authority to authorize the
6 payment of over two million dollars to Mr. Constantine and he
7 certainly didn't do it on the day that it purports to be his
8 signature. As far as forgeries, he's looked at it and I told
9 counsel he really can't even tell if it's his signature or not
10 for sure. All he can do is say he's not a member of this
11 company and therefore had no reason to sign the document, so
12 it's fraudulent.

13 As far as other forgeries, we have shown a whole
14 bunch of records to people, most of them again, kind of like
15 Mr. Kaiser's, would say it looks like my signature, frankly,
16 Mr. Kenner had during the period of time of the conspiracy had
17 me sign many documents that I didn't look at closely or
18 sometimes sign documents -- sign blank sheets of paper
19 supposedly because they would be needed at a later date when
20 the players were on the road or whatever.

21 It's not going to be our theory of the case that
22 except for the Jowdy documents and others maybe that I can't
23 think of right now that there are -- that the forged documents
24 are critical to the proof of the fraudulent scheme here. So,
25 I've conveyed that I think to counsel in emails and in

1 face-to-face meetings. The bottom line is we have no other
2 documents that we would say right now this is a forgery or
3 that's a forgery. I know that's not the clearest answer,
4 particularly for Mr. Kaiser, but that's the best we can do.

5 THE COURT: If that's his testimony, that's his
6 testimony, there's nothing you can do about it.

7 MR. MISKIEWICZ: Also I'll add I have witnesses who
8 will say, and I've conveyed this to counsel, they observed
9 Mr. Kenner during the course of the conspiracy imitating or
10 forging people's signatures, even telling one of the witnesses
11 how good he was at forging them, again ostensibly because in
12 case I need your signature, I have it, you know, I can convey
13 it, I can do your business. That's what he told witnesses.
14 The fact that there may be actual forgeries, again, is not
15 part and parcel of our proof, it's that the transactions, not
16 the signatures are fraudulent.

17 THE COURT: Okay.

18 Mr. Haley?

19 MR. HALEY: Thank you, Judge. I have listened to
20 the government's response, thank you.

21 THE COURT: Okay. Next issue?

22 MR. HALEY: Your Honor, the next issue and, by the
23 way, I do want to convey my thanks to the government, I was
24 interested in knowing what the lineup might be in terms of
25 witnesses because of the volume of material and I would

1 certainly represent to the government, as well as the Court,
2 we do intend on putting on a defense. It is my intention to
3 call Mr. Kenner as a witness, we've identified other
4 prospective defense witnesses, and I would certainly before we
5 commence our case give them a lineup in terms of our witnesses
6 as well. So, I would represent that to the Court and the
7 government to move the matter along.

8 But the other issue, Judge, really it's still a
9 little bit problematical and has to deal with the MacBook
10 computer, it seems to be a recurring issue. I have been in
11 contact with Mr. Polemeni and I apologize because I didn't
12 realize, perhaps it's not an issue that these prosecutors can
13 address, Mr. Polemeni, did write a letter, actually it's on
14 ECF, dated April 24th which details what the government
15 anticipated would be the schedule for my client's use of the
16 MacBook computer at MDC. The letter is comprehensive, it is
17 certainly acceptable to us. I'm not pressing, Judge, but I
18 mentioned that my fear was given -- I don't mean this
19 critically, given the reality of dealing with a bureaucracy at
20 MDC Brooklyn, it hasn't made it through the system and what's
21 transpired is on Sunday my client was told that, no, he has no
22 access to the computer today, he was told that his hours were
23 limited to -- on Saturday from noon to 2:30. I was hopeful
24 that yesterday he would be here with his laptop computer. He
25 was told that because it's not on the property list at MDC

1 Brooklyn he's prohibited from ever taking it out of the
2 facility to court.

3 The point is simply this, Judge, I don't know how to
4 resolve this, perhaps if Your Honor so orders this letter and
5 it's served on the Legal Department at MDC Brooklyn it might
6 then sift through the various levels of command but it's
7 absolutely a unique circumstance, Judge, I know that to be a
8 fact for an inmate at MDC Brooklyn to have that level of
9 access to a MacBook a laptop computer. I can only suspect
10 that it may cause issues there, an inmate sees that one inmate
11 has his own private computer.

12 THE COURT: Have you spoken to the AUSA about these
13 issues or not?

14 MR. HALEY: For my own final comment, it strikes me
15 that one possible solution, I understand why Mr. Kenner was
16 moved from the Queens private correctional facility to MDC
17 Brooklyn and I don't quarrel with that decision. Again, we
18 established through a great deal of time on my part to
19 establish the protocol, we had no problems with the access to
20 the computer at the Queens private correctional facility. To
21 the extent that there's an allegation that a person in the
22 facility recorded conversations between himself and Mr. Kenner
23 and to the extent that Mr. Kenner now knows who that person is
24 and there would be a security concern which I think it's
25 legitimate under those circumstances that they be separated.

1 I'm advised that there's any number of separation orders in
2 the Queens Correctional Facility and Mr. Kenner could be
3 housed in a different section of the Queens Correctional
4 Facility so that that security issue is alleviated rather than
5 having him moved to MDC Brooklyn. Thank you, Judge.

6 THE COURT: My position -- we did have an ex parte
7 sealed proceeding which is reflected in that letter --

8 MR. HALEY: Yes, sir.

9 THE COURT: -- where the government advised me what
10 the reason was and they did assure me that he was going to
11 have the access to the computer in the MDC and, again, it's a
12 matter of discretion, that as long as Mr. Kenner is able to
13 prepare for his trial from MDC, even assuming what you're
14 saying is true that they could try to separate him in some way
15 in the Queens facility, it's not my role to interfere with
16 that decision. I have inmates who come from the MDC who are
17 housed for space reasons and I don't interfere with those
18 decisions either. So, I'm not going to direct them to move
19 him back to Queens and try to keep him in a separate area.

20 Let me just ask Mr. Miskiewicz; do you know why
21 there are continuing issues at MDC?

22 MR. MISKIEWICZ: I spoke to Kenneth Bork at MDC and
23 he advised me that the decision by some of the corrections
24 officers not to give the defendant access on Sunday was a
25 mistake. He has met with the lieutenant in charge of those

1 officers. They misunderstood for whatever reason because
2 there were family meetings taking place, they thought that
3 they could not allow him to have access to the computer.

4 To make a long story short, he recognized that that
5 was a screw up and he's advised me that he's met with the
6 lieutenants and various staff members to make clear that from
7 here on he should be given access as per -- and I didn't
8 realize that there was a schedule letter, but per whatever
9 agreement has been made.

10 THE COURT: What about bringing the computer to
11 court, are you talking about that?

12 MR. MISKIEWICZ: Yes, that's a bigger issue, and I
13 understand the court orders of last week, I'm going to just
14 merely reflect what was said to me and then maybe offer some
15 possible solutions; but what Mr. Bork told me was that it
16 would constitute a security concern of theirs for a computer
17 that's been on the outside for some number of hours during the
18 day and might have access to Wi-Fi and any other, you know,
19 things, that upon return to the MDC in the evening they would
20 need to have an IT specialist look through the computer,
21 review it, see if there are things there that were different
22 from when it left the facility in the morning and that would
23 put an enormous strain on the staff, they don't have -- there
24 is probably only one individual in the entire facility who
25 could do that and that person would have to be around for late

1 nights whenever Mr. Kenner returns during the trial.

2 The other security concern is that it poses a target
3 within the MDC, not necessarily just making Mr. Kenner a
4 target but the actual equipment becomes a target of other
5 inmates who want to get access to it because it is a highly
6 highly unusual item to have inside the MDC.

7 So, there are two possible alternatives and I offer
8 this, and I also told Mr. Kenner (sic), relayed it to him your
9 very strong order that the laptop follow the defendant, that
10 one alternative would be to simply allow Mr. Haley to have
11 possession of that laptop during the trial and keep possession
12 of it so that the defendant can have access to it here in
13 court. That raises the problem that he wouldn't then have
14 access to the laptop during the weekends or when the Court
15 is not meeting.

16 Another alternative would be to buy another
17 laptop, make a copy, which copy would remain in possession of
18 Mr. Haley and the other laptop remain in the MDC and there
19 wouldn't be this need to constantly check it, check it in and
20 check it out. Anyway, that was the sum and substance of my
21 discussion with counsel this morning.

22 THE COURT: Okay.

23 Mr. Haley?

24 MR. HALEY: Your Honor, for purposes of the record,
25 we spent time, I did, my office did in an effort to resolve

1 the issue about Wi-Fi access and we actually engaged an
2 expert, a forensic expert -- I shouldn't say that, a computer
3 expert to permanently disable the Wi-Fi function on the
4 laptop, it's permanently disabled, because it did become an
5 issue with the laptop being in the Queens Correctional
6 Facility. We disabled it, we sent it to Queens, they had
7 their technical people -- as a matter of fact, I even think
8 the government had one of their FBI technical people confirm
9 that the Wi-Fi function was disabled. It is disabled.

10 So, the idea that there would be a legitimate
11 concern that somehow he would be here gaining Wi-Fi access and
12 downloading material on the computer I believe is resolved. I
13 don't necessarily see the difference between an individual who
14 brings let's say boxes of material or his paper file to court
15 to prepare for trial with his attorney and then brings those
16 paper files back to the facility. Certainly someone can slip
17 within those paper files I guess documents that didn't belong
18 there and I guess they could then go through and look at that.
19 I don't know if they do during a trial when an individual is
20 going back and forth.

21 Judge, I don't know how to -- my only comments are
22 this, it's because of the volume of material and because it's
23 no one fault, the material gets delivered in electronic form.
24 That laptop computer is our database, it's my database, it's
25 Mr. Kenner's database, we share it together. He's able to

1 pull up a document immediately for me. It is our source of
2 preparation.

3 THE COURT: That's what I was going to ask you, so
4 you don't have another computer that you're using, you're
5 using his computer or you have all the same documents on
6 another computer?

7 MR. HALEY: What I do, Your Honor, is -- this is the
8 protocol, when I get the government's Rule 16 discovery and I
9 download it to my computer at my office, not a notebook, my
10 office computer, the PC. So, I do have on my PC at my office
11 most but, quite frankly, not all of the material that my
12 client has for the simple reason that he's much more adept at
13 being able to pull files off the CD-roms than I am. I
14 probably have a good 80 percent of what I've received from the
15 government on my PC computer in my office but the computer
16 that he has in his possession is the primary source of
17 information for both of us, that is the most comprehensive and
18 complete source of information.

19 THE COURT: Okay. I'm asking Mr. Miskiewicz to go
20 back to the MDC in light of the fact that it's been disabled,
21 and obviously I understand the security issues the jail has to
22 deal with, but if the computer is disabled I'm not sure what
23 the security issue would be. Given that this is basically
24 what they're going to be using at trial sitting at counsel
25 table, if it means even having the computer come with him each

1 day but not being given to Mr. Kenner, maybe somehow being
2 given to Mr. Haley at the beginning of each day so he has
3 physical custody of it in the courtroom and then hand it back
4 to the Marshals at the end of the day so Mr. Kenner is not
5 going to have it in his cell downstairs or wherever else, I
6 would be willing to go along with that.

7 MR. MISKIEWICZ: I agree. I'll call counsel.

8 THE COURT: If they say no, we're going to have a
9 conference call, someone from the MDC is going to have to be
10 on the phone with me and explain to me why this -- you can
11 convey to them I understand it is an unusual request but it is
12 an unusual situation where their ability to function in the
13 courtroom is dependent upon a computer that -- I guess we can
14 buy another one if we had to, couldn't we do that, just
15 download everything onto an exact same computer? I don't
16 think that's the best way to do it but is there any reason
17 that you couldn't do that if you had to?

18 MR. HALEY: No, Your Honor, as long as the Court
19 would be approving my CJA vouchers, but I have no reason to
20 believe it would not. There is a little bit of a protocol I
21 did have to do pursuant to CJA funds that go through
22 authorization and things of that nature. My only concern is,
23 it's no one's fault, we're just a week away from trial.

24 THE COURT: I'm not suggesting -- it doesn't seem to
25 be a reasonable thing to do if it's disabled. Would you be

1 willing to take custody of it each morning?

2 MR. HALEY: Absolutely.

3 MR. MISKIEWICZ: Your Honor, with your permission, I
4 kind of hinted to this in the morning that the Court wanted
5 this to be done so and I will tell Mr. Bork that this is what
6 you expect to be done and convey to them that they should work
7 out whatever they need to do.

8 THE COURT: I don't want him to think I'm ignoring
9 him, I want him to understand that the computer is disabled,
10 we'll deliver it to Mr. Haley directly in the morning from the
11 Marshals.

12 MR. MISKIEWICZ: The concern is that this kind of
13 piece of equipment can be imported to the outside more than
14 just through Wi-Fi, there are all kinds of other things most
15 of which probably neither Mr. Haley or myself fully understand
16 because we're not all that computer literate, but that there's
17 major concern but I will convey to Mr. Bork that they have to
18 find a way to deal with this issue and I'll report back to the
19 Court.

20 MR. HALEY: As an officer of the court I will
21 obviously represent that while that computer is in this
22 courtroom I will not be making any efforts as counsel for the
23 defendant to put any information on that computer. My client
24 is going to be here in the courtroom as well, Judge, actually
25 he will have the computer in front of him and he will be able

1 to pull up a document for me that will have relevance. So, it
2 will be within our control and custody.

3 I'm a little concerned about -- it is a reality that
4 my client could be a target of others because he has this
5 device. I don't know if we can reach a protocol where -- I
6 thought perhaps other inmates might be jealous. When he comes
7 perhaps the computer when it's being transported could be kept
8 in the custody of a U.S. Marshal.

9 THE COURT: That's what I was suggesting for
10 security reasons and also for your client's not being targeted
11 that he shouldn't have access to the computer, it should just
12 travel with him in the Marshal's van each morning and be given
13 to Mr. Haley, that would be the protocol.

14 MR. HALEY: I guess the final matter; I take
15 it though we are in agreement because this does set forth
16 the schedule that Mr. Kenner would be, I'll use the word
17 entitled to in connection with the use of the computer, that
18 is to say the government's letter of April 24, 2015, correct,
19 Mr. Miskiewicz?

20 MR. MISKIEWICZ: I haven't seen that letter. It was
21 filed as part of the --

22 THE COURT: They confirm it was a mix-up. I'm sure
23 they have that letter.

24 MR. HALEY: My only comment would be if it's so
25 ordered, perhaps it would be of greater assistance to the

1 legal authorities.

2 THE COURT: I'm happy to so order it. I'll so order
3 it and make sure they have a copy of the letter.

4 MR. HALEY: Thank you, Your Honor.

5 THE COURT: All right. Are there any other issues
6 from the government today?

7 MR. MISKIEWICZ: No major problems. We're going to
8 attempt to continue to work on custodian stipulations for
9 business records. I've also conveyed to Mr. LaRusso, I didn't
10 have a chance to ask Mr. Haley, but if they do intend to call
11 certain witnesses, we're going to ask for some early
12 production under 26.2 at some point given that. I don't
13 really have any other issues to raise with the Court today --
14 oh, and also an expert report, notification of an expert
15 report because Mr. LaRusso is printing it out, actually two
16 experts; one I think is an accountant named yesterday during
17 jury selection, Mr. Sempel (ph). Also he's I believe engaging
18 a forensic handwriting expert and, as I indicated in light of
19 that, we're probably going to do so for purposes of this John
20 Kaiser signature on the consulting agreements even though our
21 principal contention is whether it's a forgery or not, it's
22 still fraudulent.

23 So, we're going to provide Mr. LaRusso as soon as
24 possible with the photograph that his expert has indicated he
25 can work from and also provide to him exemplars from

1 Mr. Kaiser. I told Mr. LaRusso we have signature exemplars we
2 can turn over. He's asked me to obtain numeric exemplars
3 which we don't have. I don't know where Mr. Kaiser is today,
4 he may still be in Mexico or on his way back but he may not be
5 back until next week. So, as soon as we can do that, we'll
6 effectuate that. I think that's it.

7 THE COURT: Okay.

8 MR. LaRUSSO: Your Honor, that is the extent of the
9 conversation we had today. The only other matter regarding
10 handwriting is if our expert feels that it is necessary for a
11 complete analysis to look at the original, Mr. Miskiewicz
12 agreed that he will make that available for examination.

13 The only thing we haven't discussed, and we were in
14 the process of doing that before the case got called, was the
15 question of the tape analysis and our expert who I haven't
16 spoken to but through hearsay I understand would like to have
17 access to the original Home Depot tape if it is available, at
18 least whatever first generation tape that they have and,
19 secondly, the machine on which the recording was made. I'll
20 discuss this with Mr. Miskiewicz to see if we can work it out
21 without the need to burden the Court with this. If we have an
22 impasse, we'll address it later.

23 MR. MISKIEWICZ: We never made the recording so we
24 don't have the machine, we have no idea how it was made. The
25 best we can simply say is it was forwarded to I think one of

1 our witnesses, maybe several of our witnesses who would say
2 they got it from the defendant, Mr. Kenner, so we don't know
3 that we're going to be able to provide -- we don't have the
4 first generation, we have whatever copy we turned over.

5 THE COURT: Whatever the earliest generation the
6 government has, you should make it available, whether it's the
7 quote/unquote original, but for purposes of examination the
8 earliest generation you should make available.

9 MR. MISKIEWICZ: Okay.

10 MR. LaRUSSO: Thank you, Your Honor. I believe the
11 last one, you reserved on the motion to strike the alias.

12 THE COURT: I have a couple of questions on that.
13 I just want to make sure, Mr. Constantine, are you still on
14 the line?

15 DEFENDANT CONSTANTINE: Yes, Your Honor, I have
16 the mute button pushed so you didn't hear the background
17 noise.

18 THE COURT: I wanted to make sure you were still on
19 the line.

20 I guess I want the government to explain a little
21 bit further -- well, first, Mr. LaRusso, they did put in a
22 letter explaining what the relevance is. One area of
23 relevance is I guess they wanted to show that he used an image
24 building firm for reputation I guess. I don't understand what
25 the significance of that is. You're saying some of the --

1 what's the significance of him going to that firm?

2 MS. KOMATIREDDY: Your Honor, I can explain it
3 briefly. I would say the primary significance of the former
4 name is that the defendant, Mr. Constantine, told the victims
5 about it in his initial conversations with them and the
6 rapport --

7 (The court reporter seeks clarification.)

8 THE COURT: The rapport building, is that what you
9 said?

10 MS. KOMATIREDDY: The rapport building effort to
11 gain their trust. The defendant used proceeds of the fraud to
12 hire HL Group, the group that is a New York PR firm to then
13 respond to an article that had appeared in the New York Post
14 that mentioned the prior name. I have a copy of the short
15 article with me in court.

16 THE COURT: First I want to ask Mr. LaRusso -- I'll
17 come back to the first one. I don't quite understand that
18 theory of the government because usually the government makes
19 that argument of trust when two people are agreeing on
20 something criminal; in other words, you disclose your criminal
21 background to gain the trust of someone else who is a criminal
22 if you're doing a crime together. Obviously that wasn't the
23 relationship here so I'm not sure why someone is going to come
24 to court and testify that he built a rapport with me, I
25 trusted him because he told me he has a prior drug conviction,

1 I'm not sure how that would build trust with an investor.

2 But the second one is the one I'm more focused on
3 which is are you disputing that part of the theory of the case
4 that he used investment proceeds to pay this company to
5 develop his image? If that's in dispute, then it would be
6 important for the jury to understand. If you're saying he
7 never did that, it would be more important for the government
8 to elicit why he was doing it. So, is that in dispute that he
9 spent that money?

10 MR. LaRUSSO: Your Honor, if I may, Mr. Oliveras has
11 been dealing with this, may he address the Court?

12 THE COURT: Sure.

13 MR. OLIVERAS: Thank you, Your Honor.

14 THE COURT: Make sure that you use the mic so
15 Mr. Constantine can hear you.

16 MR. OLIVERAS: The article I believe didn't mention
17 his former name -- oh, it didn't mention his former name, I
18 take it back, but that wasn't the crux of the article. The
19 crux of the article was about the way the funds were working.
20 It wasn't -- the purpose of hiring the HL firm which was
21 authorized under the Global 7 fund wasn't to just go after his
22 image, it was to build up Eufora in general to help the
23 investors money because they were being -- the victims were
24 being slammed by -- it was a tit for tat in the papers is what
25 it came down to but it wasn't him personally that was doing

1 it. It happened to have been in the same article because he
2 happened to be the founder of the company, but that's all it
3 was and it was in an effort of full disclosure why he was
4 giving people the -- he was telling people what his former
5 name was -- he hadn't told the former investors, told them
6 that he was changing his name which had nothing to do with the
7 drug conviction but he did tell them that he had a former drug
8 conviction.

9 He changed his name, if Your Honor remembers
10 yesterday, he tried to pronounce his name, he couldn't -- it
11 wasn't pronounced. When he was doing his race car driving
12 announcers on live TV were having trouble -- a tough time
13 saying it and so he wanted it easier to pronounce his name.

14 THE COURT: You're saying he told the investors
15 about the prior conviction?

16 MR. OLIVERAS: He did tell the investors about the
17 prior conviction but that wasn't why -- that it had something
18 to do with his prior name, although it was his name at the
19 time but he wasn't trying to hide that from them by changing
20 his name.

21 THE COURT: So, is it the government's theory then
22 that the use of the investor money, that that was a diversion,
23 in other words, that was an illegitimate use of the investor
24 money?

25 MS. KOMATIREDDY: Yes, Your Honor, the government's

1 theory is that it is an illegitimate use of money that
2 investors had given to the Global settlement fund. In
3 particular, the government witness will testify that
4 Mr. Constantine hired HL Group to respond to a Page Six
5 one paragraph article that ran on April 22nd, 2009, that
6 stated that Mr. Constantine recently gave a speech at the
7 University of Southern California but he failed to mention
8 that he changed his name from Tommy Hormovotis and he was
9 sentenced to six years in an Illinois state prison for drugs
10 or that he was a business associate of Phil Kenner and was
11 being sued and the individual at the HL Group who initiated
12 the relationship with Mr. Constantine was referred to this
13 article by Mr. Constantine and asked to respond to that
14 article and that individual was paid using the proceeds of the
15 fraud. That's the government's theory. And in order to
16 explain that diversion we would seek to submit this article
17 into evidence as evidence of why this individual was being
18 paid with the money and in order to tell that part of the
19 story.

20 THE COURT: I am concerned given what I've heard. I
21 thought I heard you say -- if Mr. Constantine's position is
22 that was a legitimate use of the money, that investment money
23 was used to develop the investment in some way, how is the
24 government going to respond to that without referring to what
25 they say is the real reason for the use of the money which is

1 his own image, nothing to do about the investments; I don't
2 know how they can respond to that, how can they prove that
3 without referencing what their witness is going to say was the
4 whole purpose of the use of the funds.

5 MR. OLIVERAS: I understand that, Your Honor, and I
6 apologize for interrupting but it was -- if that was the only
7 reason why he had contact with HL Group, I would wholly agree
8 with the government, but that's not what it was, it was one
9 facet of a number of different things that HL Group was doing
10 to turn around the image of Eufora as a whole and as the CEO
11 and president he needed to do that for himself, so that's why
12 there was a response to that.

13 THE COURT: What's the government's witness going to
14 say, this was part of a larger effort?

15 MS. KOMATIREDDY: The witness will say that he also
16 did work in order to enhance the image of some of the hockey
17 players, not all of them. We believe that the victim hockey
18 players would say -- some of them did not authorize this. I
19 think the response that Mr. Oliveras is offering, really
20 that's an argument for the jury whether 100 percent of the
21 funds were with diverted or some of the funds were diverted
22 and diversion is still unauthorized use of investor money and,
23 therefore, part of the government's theory of fraud.

24 THE COURT: I understand that but there is -- under
25 403 obviously I have to consider the fact of a conviction,

1 that an article that references that conviction of six years
2 in jail, it's a 403 concern. I understand the relevance of it
3 but I'm going to think about it. I'm going to continue to
4 reserve on it. My concern is that there may be a way of
5 having the witness describe in more general terms being able
6 to respond to an article in the Post without referencing the
7 details of what it was about. I don't know how much
8 limitation can be done without sort of gutting the probative
9 value of it. I do want to look at the article.

10 MS. KOMATIREDDY: Yes, Your Honor. If I may add one
11 comment, I think it could be limited or redacted in a way that
12 is not obvious.

13 The other part of our theory I think actually
14 requires a little bit more explanation which is
15 Mr. Constantine discussed -- actively discussed his prior drug
16 conviction with the victims and portrayed himself as someone
17 worthy -- as someone who had had a past who turned his life
18 around and now is worthy of trust and that is something that
19 the victims were told as part of the story of how they met
20 Mr. Constantine and why he was convincing, why they trusted
21 him. That is a natural part of the way they tell the story.
22 I think we can instruct our witnesses not to mention the
23 length of any jail term or the details of the conviction and
24 to limit it to accommodate the Court's concerns but we see it
25 arising in the victims's testimony.

1 THE COURT: Did the victims know about it or he
2 self-disclosed it to them? Did they know?

3 MS. KOMATIREDDY: He self-disclosed it, Your Honor.
4 It was part of an effort to look as if he is being forthright
5 and straightforward in his initial meeting with the
6 individuals so that if they did later Google his name, that
7 they wouldn't be taken aback; rather, it was taking the sting
8 out of it, if you will, in the very first meeting by coming in
9 saying, I know you don't know me, here's who I am, I do have a
10 past but I've turned my life around and I'm somebody that you
11 can trust and I'm here with Phil Kenner who is someone you
12 already trust.

13 THE COURT: Yes. Again, unless I'm persuaded that
14 someone is investing the money, that that would have been a
15 critical determination that someone told them about a prior
16 conviction, told them I turned my life around, I assume
17 there's other aspects to what he said in relationship to
18 Mr. Kenner that were driving their decision to invest rather
19 than someone saying, I have a prior conviction but I turned my
20 life around, I just don't think that has a high probative
21 value under 403. I can't understand why an investor would be
22 unable to explain why they gave their money to someone,
23 trusted someone without referencing the fact that, oh, he also
24 told me he had a prior conviction but it was okay. That would
25 seem to be tangential. Maybe I'm misunderstanding what the

1 nature of the testimony is but I don't see how that's a
2 pivotal reason for them to invest --

3 MS. KOMATIREDDY: I apologize, Your Honor, I didn't
4 mean to interrupt. I think it is part of the emotional
5 reason, Your Honor, I think there's a desire to give people
6 second chances and this is part of playing on investors' good
7 faith.

8 THE COURT: Again, if they had known about it and
9 presented it to him and he said something like that, to me
10 that would be more probative value, but someone self-discloses
11 something, again, they can describe the nature of their
12 conversation, he was open with us, he talked openly about his
13 background with us, but I have a hard time viewing that as
14 highly probative in terms of an investor's decision whether he
15 self-discloses it, especially the prejudicial effect.

16 I'm more concerned about the second aspect because
17 the government should be entitled to if there was unauthorized
18 diversions of doing that, so let me see the article. The
19 government should not reference this in their opening. I'll
20 resolve this first thing Monday morning. So, until you hear
21 otherwise from the Court, Mr. Constantine's prior conviction
22 discloses the use of another name should not be questioned --
23 who is your first witness? Is that going to come up with the
24 first witness or not?

25 MS. KOMATIREDDY: It will not come up with the first

1 witness, Your Honor.

2 THE COURT: All right.

3 MR. LaRUSSO: Your Honor, could I chime in briefly?
4 The name still has nothing to do with whether or not -- the
5 name shouldn't be there whether or not he has an alias or it's
6 not even an alias, it's a prior name, it's a legal name.

7 THE COURT: I thought the name was in the article.
8 Didn't you just tell me the name was mentioned in the article?

9 MR. OLIVERAS: It is but I guess what I'm saying is
10 what makes it -- when they're talking about the drug
11 conviction and any name change, our worry is that it's too
12 prejudicial to have an alias, a quote/unquote alias out there
13 which isn't really an alias.

14 THE COURT: I understand. Don't you hear what I'm
15 saying, I'm agreeing with you. I already expressed my
16 concern. An alias has a potential prejudicial impact, so I
17 understand they are two separate issues.

18 Mr. Constantine, are you still there? I heard a
19 beep. Maybe he just fell off.

20 Mr. Constantine, are you still there? I just heard
21 a beep.

22 So, I don't want to do it without him. I'm going to
23 read the article and discuss it more on Monday, all right.

24 MR. HALEY: It's a minor matter, Judge, it doesn't
25 involve Mr. Constantine.

1 THE COURT: Mr. LaRusso, are you okay with
2 proceeding with this issue with Mr. Kenner?

3 MR. LaRUSSO: I am, Your Honor.

4 MR. HALEY: I have done my best to isolate documents
5 already in hard cover copy for purposes of what would be
6 potential defense exhibits at trial. There may be an instance
7 where based upon what a government's witness has to say on the
8 witness stand, there may be a document that I would like to
9 have marked for identification and shown to the witness and,
10 depending upon that witness' testimony, offered into evidence
11 if they authenticate the document.

12 My theory, Judge, is that I may not have that
13 document currently in my file, so I mention very simply, it
14 does again have to do with the computer but I believe we
15 resolved the issue over the weekend, I may look into
16 purchasing a printer, and I mention it to the Court because I
17 would be seeking the Court's CJA authorization, so we'd be
18 able to have a printer here in the courtroom that I could then
19 hard wire to my client's laptop computer to the printer and I
20 would be able to pull up a particular document and then print
21 it out here in the courtroom. I already spoke to the
22 technical people here today setting up for the government and
23 they advised me that they should be able to do that as long as
24 the MacBook computer has a USB port. I wanted to alert the
25 Court to that.

1 THE COURT: That's fine but I want you to do that --
2 obviously I don't want us all sitting here with the jury while
3 you're printing up documents.

4 MR. HALEY: I agree.

5 THE COURT: If you do it in advance, that's fine.

6 MR. HALEY: Thank you.

7 THE COURT: All right. So, my law clerk will give
8 you a copy of the preliminary instructions I intend to use on
9 Monday morning. They're standard instructions for a criminal
10 case. So, you'll have those and you can tell me if you have
11 any objection on Monday morning. All right. So, I'll see you
12 all at 9:30. Thank you.

13 MR. LaRUSSO: Thank you, Your Honor.

14 MR. HALEY: Thank you, Your Honor.

15 MR. MISKIEWICZ: Thank you, Your Honor.

16 (End of proceedings.)
17
18
19
20
21
22
23
24
25